CF0000059498

(2)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR(M.P:)

CRIMINAL APPEAL NO. 872 OF 1998.

APPELLANT : GHASI RAM PASWAN S/o Bhurawan Paswan,
R/o Balco, P.S. Balco,
Tah, Korba, District Bilaspur (M.P).

5912
6-11-98.
Vijay Benjay
Advocate

VERSUS

RESPONDENT : State of Madhya Pradesh,
Pl. A.R.
Through P.S. Balco.

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(29)

आदेश पत्रक

G.A. 1299/98 and 872/98
मामला क्रमांक ..... सन् ~~200~~

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench: -

Hon'ble Mr. L.C. Bhadoo and
Hon'ble Mr. Dhirendra Mishra, JJ.

21-4-2006

Mr. Ashok Verma, counsel for appellant Sipahiya in Criminal Appeal No.1299/98.

Dr. Shailesh Ahuja, counsel for appellant Ghasi Paswan in Criminal Appeal No.872/98.

Mr. U.N.S. Deo, Additional Public Prosecutor with Mr. D.K. Gwalre, Deputy Govt. Advocate for the State/respondent.

Oral judgment dictated on *Dais*.

Per L.C. Bhadoo, J: -

Criminal Appeal No.1299/98 filed by Sipahiya and Criminal Appeal No.872/98 filed by Ghasi Paswan are being disposed of by this common judgment, as both these appeals are arising out of the same incident and the same judgment.

The accused/appellants have preferred these appeals questioning legality and correctness of the judgment of conviction and order of sentence dated 9-3-98 passed by the Additional Sessions Judge, Korba, in Sessions Trial No.46/96, whereby learned Additional Sessions Judge after holding accused/appellant Sipahiya guilty for commission of offence under Section 302 of the I.P.C. and accused Ghasi Paswan under Section 302 read with Section 34 of the I.P.C., sentenced each of the accused to undergo imprisonment for life.

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(30)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

The case of the prosecution, in brief, is that there was a shop of snacks of complainant Lalan Gupta (PW-1) near the country made liquor shop in Balco Nagar. His younger brother Chatanki & Banarsi were also having snacks shop near the country made liquor shop. On 15-11-95 at 8.30 p.m. when the complainant was serving snacks to the customers and he heard the shout of Uma Shankar Gupta who was also having a snacks shop near the shop of Chatanki. Uma Shankar shouted saying that accused Sipahiya and his brother-in-law Ghasi are attacking Chatanki. Hearing the shout of Uma Shankar, Lalan Gupta rushed towards that side and saw that accused Sipahiya after throwing down his brother Chatanki sat on his brother and was saying that he will kill Chatanki, and stabbed Chatanki with knife 3-4 times on which Lalan Gupta tried to intervene in order to save his brother. In the mean time, Ghasi, brother-in-law of Sipahiya, who was standing there with Lathi, assaulted Lalan Gupta with Lathi and said, "you leave Sipahiya" on which Lalan Gupta left Sipahiya and thereafter, Sipahiya & Ghasi ran away towards the forest.

The matter was reported by Lalan Gupta in Police Station: Balco under F.I.R. Ex.P-1. Receiving the report, the Station House Officer, Police Station, registered Crime No.363/95 under Section 307 read with Section 34 of the I.P.C. and left for the scene of occurrence. After giving notice to the Panchas, he prepared the inquest report (Ex.P-2) of the dead body of Chatanki at 10.30 p.m. He took into possession plain soil and blood stained soil from the place of occurrence under Ex.P-3. He also took into possession, the leather chappals of accused Sipahiya and Ghasi under Ex.P-4. Site plan of the place of occurrence Ex.P-5 was prepared by the Investigating Officer. Accused Sipahiya while in police custody

[पीछे देखिये

(31)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

gave memorandum Ex.P-6 regarding the weapon of offence, knife, and in pursuance of that, he got recovered the knife under Ex.P-7. Clothes of accused Siphaiya were taken into possession under Exs.P-8, P-9 & P-10. Accused Ghasi gave memorandum Ex.P-11 while in police custody regarding the place where he kept Lathi, the weapon of offence, and same was taken into possession under Ex.P-12 at the instance of accused Ghasi. The dead body of Chatanki was sent for post-mortem examination to the 100-bedded Hospital, Korba, under Ex.P-13 where Dr. D.K. Shrivastava (PW-9) conducted post-mortem and prepared the post-mortem report Ex.P-25. Injuries of Chatanki were examined by Dr. S. Narendra Babu (PW-4), and he prepared the injury report Ex.P-15. Recovered articles were sent for examination to the Forensic Science Laboratory, Sagar, from where the report Ex.P-17 was received.

After completion of investigation, charge sheet was filed in the Court of Judicial Magistrate, First Class, Korba, who in turn committed the case to the Sessions Judge, Bilaspur, from where learned Additional Sessions Judge, Korba, received the case on transfer for trial.

The prosecution in order to establish charges against the accused/ appellants examined nine witnesses. On the other hand, statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which they denied the prosecution evidence and stated that they are innocent, and one defence witness Om Prakash Pradhan was examined.

Learned Additional Sessions Judge after hearing counsel for respective parties, convicted and sentenced the accused persons as mentioned in para 2 of this judgment.

[पीछे देखिये

(52)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

We have heard Mr. Ashok Verma, learned counsel on behalf of accused Sipahiya, Dr. Shailesh Ahuja, learned counsel on behalf of accused Ghasi Paswan and Mr. U.N.S. Deo, learned Additional Public Prosecutor with Mr. D.K. Gwalre, learned Deputy Govt. Advocate appearing on behalf of the State/respondent.

The homicidal death of Chatanki is not in dispute.

As far as involvement of accused Sipahiya in the crime in question is concerned, Uma Shankar Gupta (PW-2) is the main witness who witnessed the crime in question and whose snacks shop was near the snacks shop of Chatanki, the deceased. He has stated in his evidence that in November, 1995, at about 8.30-9.00 p.m. he was at his shop and adjacent to his shop Chatanki's shop was there. Sipahiya came to his shop, purchased mutton of two rupees and left his shop to go towards the country made liquor shop from where he purchased half bottle of liquor. Sipahiya had not paid two rupees to him and he was roaming carrying Chhakku in his hand. Thereafter, he went near Chatanki and called Chatanki. At that time, Chatanki was preparing tobacco with his hands and accused Sipahiya stabbed Chatanki with knife, which he was carrying in his hand. Chatanki tried to save himself from the assault of knife as a result of which he received injuries on hand and thereafter, Sipahiya stabbed Chatanki with knife on his stomach, on which he shouted. On account of the stab injury, intestine of Chatanki came out and blood started oozing out of the injury. Chatanki fell down. His clothes were drenched with blood. Hearing his shout, Lalan Gupta came and caught hold of Sipahiya from back. At that time, accused Ghasi came and assaulted Lalan with club. Ghasi is brother-in-law of Sipahiya and in order

पीछे देखिये

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

to get Sipahiya freed, he assaulted Lalan with club. On the assault made with club, Lalan left Sipahiya, and Sipahiya & Ghasi ran away. Uma Shankar (PW-2) tied towel round the injury sustained by Chatanki. Vinod, younger son of Chatanki and others came. This witness has also proved the seizure of soil by the Investigating Officer as also the chappals of accused persons under Exs.P-3 & P-4. In para 9 of his evidence, he has further stated that Sipahiya stated before him that if Chatanki's snacks shop will continue, he will kill him. Accused Sipahiya gave memorandum Ex.P-6 to the police in his presence, regarding the place where he concealed the knife, weapon of offence, same was reduced into writing, thereafter, he took the Investigating Officer to the said place, took out the knife and produced before the I.O., same was taken into possession under Ex.P-7. He has also stated that clothes of the accused were taken into possession under Ex.P-8.

The evidence of Uma Shankar Gupta (PW-2) has been corroborated by the evidence of Lalan Gupta (PW-1), who has stated in his evidence that hearing the shout of Uma Shankar he rushed towards that side and saw that accused Sipahiya assaulted his brother, he caught hold of Sipahiya from back, but accused Ghasi assaulted with club in order to ensure the release of Sipahiya, and after receiving the assault of club, he left Sipahiya.

In cross-examination of these two witnesses (PW-1 & PW-2), defence has not been able to elicit any circumstance, which makes the evidence of these witnesses untrustworthy or unreliable. Even Uma Shankar (PW-2) is an independent witness whose shop was adjacent to the shop of Chatanki, therefore, his presence at the time of incident was

पीछे देखिये

(34)

आदेश पत्रक

मामला क्रमांक ..... सन् 20(0)

..... विरुद्ध .....

आदेश का टिप्पणी आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

but natural. As per the medical evidence of Dr. S. Narendra Babu (PW-4), who examined the injuries of Chatanki, there were four injuries on the body of Chatanki, one on the wrist of right hand, and there was an injury on the stomach from which blood was oozing out.

Dr. D.K. Shrivastava (PW-9) who conducted post-mortem has stated in his evidence that there was an incised stab wound on the chest near the nipple in the size of 6.5 cms. x 3 cms., second incised wound on the upper part of stomach, third incised wound on the forearm and fourth incised wound on the left arm. His report is Ex.P-25. There was blood in both the lungs. Large intestine was full of blood. Large intestine and small intestine came out of the stomach as a result of the stab injury and injuries were present on the intestine. He also examined accused Sipahiya and noticed four injuries of abrasion.

As per the report of the F.S.L., the knife in question, weapon of offence, was recovered at the instance of the accused and same was found stained with blood. Even clothes of the accused were also found stained with blood.

Mr. Ashok Verma, learned counsel for accused Sipahiya argued that as per the evidence of eyewitnesses only one injury was inflicted on the body of deceased Chatanki whereas, as per the post-mortem report, four injuries were found on the body of Chatanki.

If we scrutinize the evidence of Uma Shankar Gupta (PW-2), who witnessed the crime, we do not find any substance in this argument for the reason that Uma Shankar has stated in his evidence that Sipahiya attacked the deceased with knife, the deceased tried to save the attack by

[पीछे देखिये

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

hand as a result of which he received injuries on his hand, thereafter, Sipahiya again stabbed the deceased on his stomach with the knife and intestine came out as a result of the stab injury. Therefore, in the first instance, we do not find any contradiction with the medical or ocular evidence. Even otherwise, as per settled law, primacy has to be given to ocular evidence and as has been mentioned above, ocular evidence of Uma Shankar Gupta (PW-2) & Lalan Gupta (PW-1) clearly establishes the involvement of accused/appellant Sipahiya in assaulting the deceased with the knife.

Mahadev Jha (PW-6), who went on the scene after closing his shop, has stated in his evidence that he went near Chatanki, he was saying that Sipahiya & Ghasi have assaulted him and he will not survive. The oral dying declaration made by deceased Chatanki was voluntary and on the spur of moment, same finds support from the ocular evidence of Uma Shankar Gupta (PW-2) & Lalan Gupta (PW-1). Therefore, as far as the conviction of accused/appellant Sipahiya is concerned, we do not find any illegality and infirmity in the judgment of the trial Court.

As far as involvement of the accused Ghasi is concerned, he has been convicted under Section 302 with the aid of Section 34 of the I.P.C. In order to attract the provisions of Section 34 of the I.P.C., the liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under S. 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. The distinctive feature of the Section is the element of participation in action. Direct proof of such intention is seldom available and, therefore, such intention can only be inferred from the circumstances

[पीछे देखिये

(36)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of S. 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true contents of the Section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. The existence of a common intention amongst the participants in a crime is the essential element for application of this Section.

In view of the above principle, if we scrutinize the evidence of Lalan Gupta (PW-1) & Uma Shankar Gupta (PW-2), Lalan Gupta (PW-1), as has been mentioned above, has stated in his evidence that when he caught hold of Sipahiya, Ghasi assaulted him twice with a club and said that "you leave my brother-in-law Sipahiya otherwise, I will kill you". Whereas, Uma Shankar (PW-2) has stated in his evidence that hearing his shout Lalan Gupta came on the scene and caught hold of Sipahiya, at that time, accused Ghasi came and assaulted Lalan with Danda for setting his brother-in-law free. In cross-examination para 22, this witness has stated that it is correct to say that when Sipahiya attacked Chatanki with knife at that time, Ghasi came on the scene. When Lalan caught hold of Sipahiya, then Ghasi assaulted him with Danda. Ghasi had not assaulted Chatanki. From the evidence of Uma Shankar (PW-2), it is clear that only Sipahiya all alone was roaming there having knife in his hand and there is no

[पीछे देखिये

आदेश पत्रक

मामला क्रमांक ..... सन् 20(1)

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

evidence that accused/appellant Ghasi was also accompanying him at that time.

Therefore, in the above facts and circumstances of the case, the prosecution has not been able to establish that Ghasi was sharing common intention with Sipahiya to attack Chatanki in order to commit his murder. He came only when Lalan caught hold of Sipahiya. Hence, we are of the considered opinion that finding of the trial Court convicting accused Ghasi with the aid of Section 34 of the I.P.C. is not based on legal evidence, as the prosecution has not been able to establish that accused Ghasi was sharing common intention with accused Sipahiya to commit the murder of Chatanki, nor in any manner Ghasi participated in the crime relating to the murder of Chatanki. In the circumstances, finding of the trial Court convicting accused Ghasi with the aid of Section 34 of the I.P.C. cannot be sustained. Accordingly, conviction and sentence imposed upon Ghasi under Section 302 with the aid of Section 34 of the I.P.C. are liable to be set aside.

In the result, Criminal Appeal No.1299/98 preferred by accused Sipahiya fails and same is dismissed. Whereas, Criminal Appeal No.872/98 filed by accused Ghasi Paswan succeeds and same is allowed. Conviction and sentence imposed upon him under Section 302 with the aid of Section 34 of the I.P.C. are set aside and he is acquitted of the said charge. Accused Ghasi is already on bail, therefore, his bail bonds are discharged. **He need not to surrender before the Court.**

Parties are entitled for certified copy of this order.

Sd/-
L.C. Bhadoo
Judge

Sd/-
DHIRENDRA MISHRA
Judge